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THOMAS LOBE, L.P.A.
Director of Finance
FRANK J. BRICHACEK, JR.
Assistant Finance Director

Engineer
PIETRO A. DI FRANCO, P.E., S.I.
LEED AP, CPESC

Building Commissioner
FREDRIC WYSS, JR.
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ROBERT M. WEGER

City of Willoughby Hills

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Robert M. Weger, Mayor

Council
CHRISTOPHER L. BIRO
NANCY E. FELLOWS
DAVID M. FIEBIG
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CHRISTOPHER HALLUM
JANET MAJKA
JOHN PLECNIK

Council Clerk
VICTORIA A. SAVAGE, CMC

March 13, 2017

Council President Nancy Fellows
Council Clerk Victoria Savage
Council Members
City of Willoughby Hills
35405 Chardon Road
Willoughby Hills, OH 44094

RE: Veto on Ordinance 2017-11

Dear Council President Fellows, Council Clerk Savage, and Council Members:

In accordance with Section 2.23 of our City Charter, I am exercising my privilege to veto Council Ordinance 2017-11. This matter was considered and voted upon by the Willoughby Hills City Council on Thursday, March 9, 2017.

I appreciate Council's desire to create a protocol for confirmation of my Department Director appointments. I find, however, that I must veto Ordinance 2017-11 in its current form due to the following reasons:

1. Council's disregard for Law Director Lobe's legal opinion at the 3/9/17 Council meeting (prior to Ordinance passage) (Exhibit 1), in which he asked that Council consider meeting with the City's Civil Service Commission to discuss their concerns, as noted in the letter provided to him dated February 8, 2017. (Exhibit 2)
2. Councilwoman and Charter Review Committee member Jennifer Greer's comments regarding her discussions with attorney and Charter Review Chairman Andy Gardner were certainly relevant and of a serious concern

to me. (Exhibit 3) He stated “This ordinance would do us more harm than good”, pointing out the following:

- a) “We are notorious for not amending ordinances. Once we adopt them, we leave them, let them go and there is nothing in the ordinance that says when the State statutes are amended, this ordinance follows.”
 - b) “Another issue is that instead of making an offer contingent upon the confirmation of credentials, we do this prior to an employment offer. This creates a framework for hiring so, shall we do this and not hire someone, or not give them an offer for employment, it opens us up to a lawsuit for failure to hire that candidate.” He fears that if they are confirmed by this framework, and we have not hired them, we will need to present the candidate with a reason for doing so or put us in an unfavorable legal situation.”
 - c) “Another issue is that it usurps the power of other areas of government that are appointed by the Charter, so we are basically giving ourselves power that are not assigned to us.” You may recall that the electorate voted to accept the Charter Review Commission’s proposal by 85%. The residents of our fine city outlined the process and Council needs to respect and follow that process.
 - d) Chairman Gardner’s final concern, as stated by Councilwoman Greer, were concerning HIPPA. She stated:
 - “I know we talked about these before, but drug screenings, psychological exams, those types of things may be important, however, the ordinance states that the results of this testing “shall be provided to Council prior to the offer of employment”.
 - “Someone stated that they may be redacted, but according to the language of this ordinance, that would not be satisfactory.”
3. I have reviewed the Civil Service Commission’s letter to Law Director Lobe dated 2/8/17. (Exhibit 2) This raises legal and practical concerns on this ordinance. Presented to Council on the same meeting date as the vote was to occur, this document could certainly not been accurately considered by Council before the ordinance was passed. The Civil

Service Commission had given a copy of this document to Councilwoman Majka at their meeting on 2/25/17, but I understand that the document was never given to Council. Civil Service Commission was never invited to a Rules Meeting or Working Committee of Council of the Whole to discuss their concerns either. I regret Council did not have this vital information before voting since it was a well-thought out document composed by three individuals who clearly understand Section 5.52 of the Charter and recognize that Ordinance 2017-11 violates the Charter in the following manner:

- Duties and responsibilities of the Civil Service Commission: “neither the general laws of the State of Ohio nor any other provision of this Charter shall impair or limit the authority conferred in this Section.” Ordinance 2017-11 impairs and limits this authority.
- “The Commission shall report its proceedings to the Mayor or Council upon request.” The Commission plans to share its findings to the Mayor (as the Appointing Authority) who may share them with Council in Executive Session only. Ordinance 2017-11 conflicts with this Charter provision.
- Medical examination is based on pension system participation and must conform to their regulations. Psychological Evaluation and Drug Screening are part of the medical record. HIPPA law will be followed. Ordinance 2017-11 conflicts with this practice.
- Not mentioned in the Commission’s letter, but another violation occurs when one reads Section 4.8.1 of the Civil Service Regulations, entitled “Medical, Psychological or Drug Testing”, which clearly states: (paragraph D): “The results of physical, psychological or drug screening examination shall be used solely to determine an applicant’s eligibility to take an examination or eligibility for appointment after an examination and shall not be disclosed nor shall it become part of the applicant’s examination score. Records of such examination shall be treated as confidential medical examination to the extent allowed by law.” Ordinance 2017-11 violates this regulation.

Exhibit 1

Transcript of Law Director Lobe's discussion during the March 9, 2017,
Council Meeting, Legislation Portion of the Meeting concerning
Ordinance 2017-11:

"Civil Service was very adamant about their conveyances and there are very deep rooted issues. I was hopeful that Janet would take the lead because there are some pretty complex issues that I thought she understood a little better than I, that is why I said that maybe she could take the lead on it. Maybe I will suggest that they come and present to the rest of the committee because that is what I will ask since they are adamant about it. So if you do that, it will solve the little breakdown of communication which maybe I was even a part of. So I think that will be the fairest thing to do because they are very adamant and when you sat down with them, they were very convincing. While you may not agree with them, they do have some good points and a lot of their points have to do with matters of HIPPA and matters that could be protected and confidential and they have a better idea of how to do it, even though this Council has the right to do what they want to do so long as it is not in conflict with the Charter. So that is what I will recommend."

and

"I will ask again that based upon that issue concerning the memo and that the Commission come to Council as a whole and at least give their concerns to the group."

To: Tom Lobe, Law Director City of Willoughby Hills

From: Willoughby Hills Civil Service Commission

Date: February 8, 2017

Subject: Final documents for hiring proposal submitted by Willoughby Hills Civil Service Commission

Enclosed for your inspection and final review are the forms created by the Commission for hiring in the Unclassified, as well as the Classified job descriptions for the City of Willoughby Hills. Although, you have seen and commented on several of the clauses of these documents, please review them in their entirety. Upon your approval they will be posted for the mandatory thirty day public comment.

You will note that we made the applicable vetting process for both Classified and Unclassified as close as possible, taking into consideration different job descriptions, departments, age requirements, and various pension plans in the City. We believe that the Commission presentation is as unbiased as possible to be in compliance with various Federal and State of Ohio Regulations. We will monitor and amend these procedures as necessary.

The Civil Service Commission had asked Charter Review Commission, as you will recall, to include the ability to have Civil Service Commission standard accepted practice of setting classification in the State of Ohio approved method. However, the Charter Review Commission instead proposed, and the Willoughby Hills voted approval in November 2015 election, the vetting of Unclassified positions by Civil Service.

Our regulations will be upgraded to address several different areas:

1. Confidentiality of applicants and workers.
2. Report(s) to the Appointing Authority
3. Terms and conditions of information contained on all WHCSC forms.
4. Revise regulation 4.6 (false statements) and set practices for investigation of any infraction.

It is our hope that these forms, checklists, and regulation updates will alleviate past problems in hiring practices.

To: Tom Lobe, Law Director

From: Willoughby Hills Civil Service Commission

It has also been brought to our attention that Council is proposing legislation for department heads. We believe that Council should classify all non-fiduciary job classifications. Fair testing is still the preferred State of Ohio method to eliminate politics from the process.

If Council chooses to have the Department Head job descriptions remain in an Unclassified State:

- Section 5.52 of the WH Charter (Duties and responsibilities of Civil Service Commission) outline the authority of the Civil Service Commission and specifically states that "neither the general laws of the State of Ohio nor any other provision of this Charter shall impair or limit the authority conferred in this Section.
- Section 5.52 of the WH Charter further states that the "Commission shall report its proceedings to the Mayor or Council upon request." The Commission plans to share its findings to the Mayor (as the Appointing Authority), who may share them with Council in Executive Session only. Some of this testing may not even be completed until AFTER a tentative job offer is given to the candidate (first reading). Both federal HIPAA and State confidentiality regulations prohibit dissemination of some of the applicant's records.
- Medical examination is based on pension system participation and must conform to their regulations. Psychological Evaluation is part of the medical record. Drug screening check is also part of a medical record.
- BCI check (18 years and older) inconsistencies are investigated by WHCSC or WHPD Detective. Driving History is sub- contracted to the State of Ohio. Driving history may include insurability by the city's insurance carrier.
- Employment history (entire) is spot checked. Not every employer will disseminate information other than employment dates.
- Character reference checks are performed by Human Resources, WHCSC, or WH Police detectives. Truth verification is normally last step in procedure.
- Continuous employment standards preclude some repeat testing, unless there is documented history of problems during employment history.

- Report will include what vetting has been done (checklist), and report of inconsistencies found.
- Hiring of Relatives is already defined by Charter, and conforms to State of Ohio Ethics Code.
- Falsification Statement is already defined on application. Falsification of any document or part of the hiring process will now fall under the jurisdiction of the WHCSC for all job classifications. Investigation, disclosures, recommendations of disciplinary action, will be forwarded to the appropriate jurisdiction.

In summary, the process has already been implemented by standardized departmental procedures. Police, and Fire Departments have their own and City Hall and Service Department are processed by Human Resources. WHCSC will monitor for quality control.

Carolyn Patton, Secretary

Thomas Kicher, Vice Chairman

Thomas Majeski, Chairman

Exhibit 3

Transcript of Councilwoman Greer's discussion during the March 9, 2017, Council Meeting, Legislation Portion of the Meeting concerning Ordinance 2017-11:

"I have several concerns about this particular ordinance and I also received a call from a long-time esteemed attorney/resident, Andy Gardner. He did say that it was OK that I use his name. I am not sure if I will get all of his points down correctly because it was a bit ago that we spoke, but his opinion, he was adamant, that this ordinance would do us more harm than good.

It specifically references ORC and I think it also somewhat relies on State statutes and we are notorious, as I am sure other cities are, for not amending ordinances. Once we adopt them, we leave them, we let them go and somewhat forget that they are there for the actual language. These ordinances are amended all of the time. We don't have anything in there that says that when the State statutes are amended, that this ordinance follows.

Another issue is that instead of making an offer contingent upon the confirmation of credentials, we do this prior to an employment offer. This creates a framework for hiring so, shall we do this and not hire someone, or not give them an offer for employment, it opens us up to a lawsuit for failure to hire that candidate because if they are confirmed by this framework, and we have not hired them, what is the reason?

Another issue is that it usurps the power of other areas of government that are appointed by the Charter, so we are basically giving ourselves power that are not assigned to us.

Finally, there are HIPPA concerns. I know we talked about these before, but drug screenings, psychological exams, those types of things may be important; however, the ordinance states that the results of this testing "shall be provided to Council prior to the offer of employment". Someone stated that they may be redacted, but according to the language of this ordinance, that would not be satisfactory.

So for those reasons, I think we need to revisit this ordinance."

EXHIBIT 4

Robert Weger

From: eemckenna@oh.rr.com
Sent: Friday, March 10, 2017 12:59 PM
To: Nancy Fellows; John Plechnik; Chris Biro; David Fiebig; Jennifer Greer; Chris Hallum; Janet Majka
Cc: Mayor
Subject: Ordinance 2017-11

Regarding Ordinance 2017-11

First, please reply to acknowledge your receipt of this email. I am using the email addresses provided on city web site and want to make sure this email is transmitted correctly.

Next, by copy to the mayor I am asking that his office forward this to the law director. (The law director's email address on the city's web site is blocked from receiving emails.)

Next, I did not attend last night's council meeting, but I wish I had. This would have given me a chance to correct the report of my comments made in Monday's meeting. It is true I mentioned Civil Service Commission makes its own rules (as indicated in the charter). However, that was a secondary point. The main point I made was the writing of this ordinance is in conflict with the charter. Council can request a report from Civil Service Commission – not that Civil service commission must supply a report to council. The burden is on council to request the report.

If I am incorrect in that the ordinance is in direct conflict with the charter, I would appreciate an explanation.

This week I provided an email with suggested amendments to eliminate the conflict with city's charter. Even with these amendments I still recommended a no vote to this ordinance.

If this ordinance is in conflict with the city charter, I would expect it is invalid as well as not enforceable. I would think it should be rescinded.

With your reply acknowledging receipt, please include a note indicating that you read this email.

Regards,

Ed McKenna
440-944-6492